BANK MUAMALAT MALAYSIA BHD

v.

CHE' RUS HUSIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[NO: R1-25-108-2002]
18 MAY 2004

LABOUR LAW: *Industrial Court - Jurisdiction - Non-compliance with collective agreement - Whether court may interpret term of collective agreement in application for non-compliance - Whether outside jurisdiction of court - Distinction between functions of court under ss. 33 and 56 of the Industrial Relations Act 1967*

LABOUR LAW: *Industrial Court - Jurisdiction - Complaint of non-compliance under s. 56 Industrial Relations Act 1967 actually a trade dispute - Whether court ought to decline hearing application under s. 56*

LABOUR LAW: *Industrial Court - Jurisdiction - Whether court acted in excess of jurisdiction - Clause in collective agreement for employer to pay three months' salary in lieu of notice - Whether court correct in holding that employer had terminated the employees' services - Whether court's finding that employer was liable perverse and erroneous*

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Whether to be granted - Whether there was an error of law*

The applicant is an entity formerly known as Bank Bumiputra Malaysia Berhad (BBMB) but is now renamed as Bank Muamalat Malaysia Berhad. In 1999, BBMB underwent a merger exercise with Bank Commerce Malaysia Berhad (BOC), now known as Bumiputra Commerce Bank Berhad. Subsequently, BOC made offers of continued employment to the employees of BBMB on exactly the same terms and conditions of employment. Some of the BBMB employees ('the respondents') accepted the offer. However, some nineteen months after, the respondents filed a complaint of non-compliance under s. 56 of the Industrial Relations Act ('the Act'). They alleged that BBMB had not complied with art. 11 of the collective agreement because it had not provided the requisite three months' notice of termination. Further, the respondents claimed that BBMB should have paid them three months' salary in *lieu* of notice. The applicant had disputed the alleged termination of the respondents and contended that it

was the respondents who left BBMB's employment to accept BOC's offers. The Industrial Court found in favour of the respondents. Hence, this application by the applicant for an order of *certiorari* to quash the said decision.

Held (allowing the application):

[1] Since there was a clear and fundamental dispute on whether the applicant had terminated the respondent's services, the Industrial Court had no jurisdiction to hear and address the trade dispute of such nature in the complaint of non -compliance under s. 56. Section 56 of the Act does not empower the Industrial Court to interpret a term of a collective agreement to determine the scope, nature and intention of parties in respect of the said terms. It is intended by Parliament to be a summary enforcement procedure for clear cut cases of non-compliance of a term of an award or collective agreement. When the facts are in dispute, such powers can only be exercised under s. 33(2) of the Act. (p 444 d)

[2] The Industrial Court had proceeded to interpret the scope of art. 11 of the collective agreement between the parties before reaching the conclusion that the applicant had breached the aforesaid art. 11. By doing so, the Industrial Court had exceeded its jurisdiction. (p 444 h)

[3] The Industrial Court's finding that the respondents' services were terminated by BBMB was perverse and not supported by evidence. There was no evidence that BBMB had ever issued any letters of termination to any of the respondents when the merger between BBMB and BOC took place. The offer to the respondents for continued employment came from BOC. An agreement was reached and the offers were accepted by the respondents. (p 446 c-e)

[4] The respondents became employees of BOC on exactly the same terms and conditions of employment enjoyed by them in BBMB. To complain now that the applicant did not give them the required three months' notice and thus seeking compensation in *lieu* thereof was clearly an act of bad faith on the respondents' part. (p 446 f-g)

[Application allowed with costs.]

Case(s) referred to:

All Malayan Estates Staff Union v. Benta Plantations Bhd Sabai Estate, Karak, Pahang [1981] 1 MLLR 634 ***(refd)***

Dragon Phoenix Bhd v. Kesatuan Pekerja-pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Anor [1991] 1 CLJ 244; [1991] 1 CLJ (Rep) 109 SC ***(refd)***

Dunlop Industries Employees Union v. Dunlop Malaysia Industries Bhd [1987] 1 CLJ 232; [1987] CLJ (Rep) 86 SC ***(refd)***

Goh & Dom Enterprise Sdn Bhd v. Union of Employees of Port Ancillary Services Supplier P Klang [1987] 1 ILR 338 ***(refd)***

Guardian Royal Exchange Assurance (Malaysia) Bhd v. National Union of Commercial Workers & Anor [2000] 7 CLJ 89 HC ***(refd)***

Holiday Inn, Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers [1988] 1 CLJ 133 SC ***(refd)***

PSC-Naval Dockyard Sdn Bhd v. Kesatuan Pekerja-pekerja Naval Dockyard Sdn Bhd & Anor [2002] 2 CLJ 364 HC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Worker's Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Companies Ordinance 1940, s. 15(1)

Industrial Relations Act 1967, ss. 2, 33(2), 56

For the appellant - N Sivabalah (Raymond TC Low); M/s Shearn Delamore & Co

For the respondents - P Vickneswaran (G Kavitha); M/s Murugavell Arumugam & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif J:

Application

This is an application by the applicant for an order of *certiorari* to quash the decision of the Industrial Court in Award No. 710 of 2002 handed down on 22 August 2002. In the said Award, the Industrial Court ruled that there was non-compliance of Article 11 of the collective agreement in respect of the applicant's failure to provide the respondents the requisite three months notice of termination. Consequently, the Industrial Court ordered the applicant to compute the monies and pay the same to the respondents within one month from the service of the award.

Facts

The following are the relevant facts in relation to the applicant's application:

The applicant is an entity formerly known as Bank Bumiputra Malaysia Berhad (BBMB). BBMB was incorporated under s. 15(1) of the Companies Ordinance 1940 and commenced business as Bank Bumiputra Malaysia Ltd. on 1 October 1965. On 24 January 1968, its name was changed to BBMB.

In 1999, BBMB underwent a merger exercise with another legal entity known as Bank of Commerce Malaysia Berhad (BOC). Before the merger, both BBMB and BOC were carrying out conventional and Islamic banking activities. Under the merger, the conventional banking assets of BBMB were transferred to BOC and BBMB took over the Islamic banking assets of BOC. The ultimate result of this merger was that BBMB conducted solely Islamic banking whereas BOC conducted solely conventional banking business. Subsequent to the merger exercise, BBMB was renamed as Bank Muamalat Malaysia Berhad (Bank Muamalat) and BOC was renamed as Bumiputra Commerce Bank Berhad (BCB).

Prior to the merger exercise, BBMB on 17 September 1998 had entered into a memorandum of understanding with Commerce Asset Holding Berhad, the holding company of BOC to facilitate the merger of BBMB and BOC. Pursuant to the execution of the memorandum of understanding, BBMB and BOC entered into an asset transfer agreement to facilitate the merger.

On 3 September 1999, the High Court of Malaya in Kuala Lumpur granted a vesting order to enable the implementation of the asset transfer agreement and merger with effect from 30 September 1999. Under the vesting order, all liabilities of BBMB were vested in BOC.

Prior to the completion of the said merger, BOC made offers of continued employment to the employees of BBMB through a letter dated 18 August 1999. Under the said letter, BOC informed the employees of BBMB about the transfer of business of BBMB to BOC with effect from 30 September 1999 and in view of that, BOC was offering them continued employment with effect from 1 October 1999 on exactly the same terms and conditions of employment enjoyed by them in BBMB. The letter also stated that should BOC fail to hear from the employees by 1 September 1999, it would presume that the employees are not accepting the BOC's offer for continued employment.

Further, by a letter dated 24 August 1999, the employees of BBMB were informed by BBMB that in view of the offers of employment and merger, BBMB had waived the employees' requirement to provide BBMB with notice or salary in *lieu* thereof.

With regard to the offer of continued employment by BOC, the trade union representing the employees of BBMB, namely KEPAK raised various grievances with BOC. As a result, the offer of employment by BOC were not accepted within the time stipulated in the aforesaid letter of offer.

Thereafter, BBMB met with the officials of KEPAK to resolve all matters pertaining the offer of continued employment. An agreement was reached on 2 September 1999 pursuant to which BOC issued a letter to the same to provide various clarification of the original offer letter dated 18 August 1999. The content of the aforesaid letter, in substance, contained the details of the agreement reached between BBMB and KEPAK. In substance, it provides that the terms and conditions of BBMB employees' employment shall be no less favourable than the terms and conditions set out in the Collective agreement between BBMB and KEPAK for the period from 20 June 1998 to 19 June 2001.

Pursuant to the letter of 2 September 1999, majority of the employees of BBMB accepted the offers of continued employment from BOC. Those who accepted the aforesaid offer became the employees of BOC. There were, however, some employees who did not accept the offers of continued employment by BOC. These employees remained in the service of BBMB which was later renamed as Bank Muamalat. For these employees, where no position was available in the applicant's service, they became redundant to the requirement of the applicant and were duly retrenched. They were given the necessary notice of termination and paid the retrenchment benefits.

The respondents in this present action were former employees of BBMB who accepted the offers of continued employment with BOC. They, on 21 May 2002 some nineteen months later after their acceptance of BOC's offer letters, filed a complaint of non-compliance under s. 56 of the Industrial Relations Act 1967 (the Act). Their complaints alleged that BBMB had not complied with Article 11 of collective agreement which relate to the requirement to provide a notice of termination by the parry who is terminating the contact of employment.

The gist of the respondents' complaint was that the action of BBMB amounted to a termination of employment of the respondent and therefore, they should be paid three months salary in lieu as per Article 11.1 of the collective agreement.

The applicant, on the other hand, disputed the alleged termination of the respondents and contended that it was the respondents instead who left the employment of BBMB to accept the offers of continued employment with BOC. The stand taken by the applicant was that there were never any acts which amount to a non-compliance of Article 11 of the collective agreement.

The Industrial Court found in favour of the respondents. Hence, the applicant is now challenging the award.

Grounds Of Application

The applicant has based his application on the following grounds:

(1) The Industrial Court exceeds its jurisdiction in proceeding to hear the dispute under s. 56 of the Act, notwithstanding the fact that there were serious and fundamental disputes of fact.

(2) The Industrial Court acted in excess of its jurisdiction under s. 56 of the Act where it interpreted Article 11 of the collective agreement.

(3) The Industrial Court arrived at a perverse finding in holding that the service of the respondents were terminated by BBMB.

(4) The Industrial Court committed jurisdictional errors when it acted outside the scope of the pleadings and on an incorrect basis of fact.

(5) Failure to join BOC as a party represents a breach of the rules of natural justice.

Findings

The respondents in their application under s. 56 of the Act, alleged that the applicant had failed to comply with article 11 of the collective agreement. Article 11 of the collective agreement reads as follows:

> Article 11: Termination of Employment
>
> 11.1. Other than in cases of termination arising out of or in connection with misconduct or during the probationary period of office, the Bank or an officer may terminate the employment of the officer by giving three (3) months notice to the other party or by paying the other party three months' salary in lieu of such notice.
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> 11.2. For the purpose of calculation of indemnity, one (1) month is considered as consisting 30 days.
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> 11.3. The effective date of the notice given by either party shall be the date of receipt of the notice.

It is the submission of the applicant that under a s. 56 complaint, the legal burden rests on the respondents to prove two essential matters. Firstly, it was incumbent upon the respondents to prove that they were entitled to a right or benefit (in this case, notice of termination or salary in *lieu* of notice) under a term of collective agreement. The right to such notice would only arise if they can establish that their services were being terminated by the applicant.

Secondly, they had to prove that the applicant had failed to comply with the said terms. It is further submitted that s. 56 of the Act cannot be invoked in a case where there are serious disputes and a fundamental dispute of facts that forms the crux of the allegation or non-compliance. In short, according to the applicant where there is a dispute on the facts leading to the alleged act of non-compliance, s. 56 cannot be invoked. This is because s. 56 is intended by Parliament to be a summary enforcement procedure for clear-cut cases of non-compliance of a term of an award or collective agreement. To support the applicant's contention, learned counsel for the applicant referred to the following cases: *Holiday Inn, Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers* [1988] 1 CLJ 133; *Dunlop Industries Employees Union v. Dunlop Malaysia Industries Berhad* [1987] 1 CLJ 232; [1987] CLJ (Rep) 86; *Guardian Royal Exchange Assurance (Malaysia) Berhad v. National Union of Commercial Workers & Anor.* [2000] 7 CLJ 89; *PSC - Naval Dockyard Sdn. Bhd. v. Kesatuan Pekerja-Pekerja Naval Dockyard Sdn. Bhd. & Anor.* [2002] 2 CLJ 364; *All Malayan Estates Staff Union v. Benta Plantations Bhd. Sabai Estate, Karak, Pahang* [1981] 1 MLLR 634, and *Goh & Dom Enterprise Sdn. Bhd. v. Union of Employees of Port Ancillary Services Supplier P. Klang* [1987] 1 ILR 338.

The respondents in rebuttal, did not dispute the authorities cited by the learned counsel for the applicant on the course of action applicable if indeed the material facts in the present case were in serious dispute. But, it is submitted for the respondents that the material facts of this case is not in serious dispute. According to learned counsel for the respondents, all that was contended by the applicant before the Industrial Court was that the applicant did not terminate the services of the respondents because no letter of termination was ever issued to the respondents and they did not admit to non-compliance to Article 11 of the said collective agreement. According to learned counsel, a mere contention of the aforesaid by the applicant does not *ipso facto* mean there is a serious dispute of facts. In support of the respondents' contention, the learned counsel referred this court to the Court of Appeal's decision of *Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Worker's Union* [1995] 2 CLJ 748.

Thus, there is a consenses of opinion that s. 56 of the Act does not empower the Industrial Court to address a trade dispute. But the question in the present case is, was there a trade dispute?

Section 2 of the Act define "trade dispute" as follows:

> "Trade dispute" means any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the condition of work of any such workmen.

In light of the definition of trade dispute above, and on the facts of this case, I am of the view that the issue of alleged termination of the respondents by BBMB was a trade dispute. The Industrial Court itself acknowledged not only that there was a trade dispute, there was also a serious dispute of facts. In the body of the award the learned Chairman said:

> In this case, notwithstanding the serious dispute by both parties on whether there is a termination of employment by BBMB or by the complainant, the court is satisfied that the complainant had been able to establish that due to the merger, BBMB could no longer employ them and had therefore enable the complainant to take up the offers of continued employment with BOC ...

Thus, I am of the view, since there was a clear and fundamental dispute on whether the applicant had terminated the respondents' services, the Industrial Court had no jurisdiction to hear and address the trade dispute of such nature in the complaint of non-compliance under s. 56. To me, s. 56 of the Act does not empower the Industrial Court to interpret a term of a collective agreement to determine the scope, nature and intention of parties in respect of the said terms. Section 56 is intended by Parliament to be a summary enforcement procedure for clear-cut cases of non-compliance of a term of an award or collective agreement. When the facts are in dispute, such powers can only be exercised under s. 33(2) of the Act.

In the present case, it is clear that the Industrial Court had entered into a detailed interpretation of Article 11 of the collective agreement as a precursor to the order of compliance against the applicant. This is evident when the Industrial Court ruled at p. 10 of the award:

> The Court is of the view that since neither Article 11 nor the provision of the CA (collective agreement) provide for waiver of notice of termination, the question of waiver by BBMB should not arise.

Further at p. 12 of the award, the Industrial Court ruled that:

> It is clear that Article 11 of the CA binds the Union and BBMB. Nowhere it is provided that it binds BOC instead of BBMB. The CA should be binding on BBMB notwithstanding the merger with BOC. The vesting order must be construed and given effect alongside with BBMB's allegations under the CA. The vesting order cannot abrogate the right and obligations of the combating parties under the CA, in particular, Article 11.

To me, the above findings clearly shows, the Industrial Court had proceeded to interpret the scope of Article 11 of the collective agreement between the parties before reaching the conclusion that the applicant had breached the aforesaid Article 11. By doing so, the Industrial Court had therefore, exceeded its jurisdiction.

I am fully aware of the "permissible overlap" doctrine propounded by the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Berhad (supra)* where Gopal Sri Ram JCA put the matter succinctly as follows:

> The dissenting judgment of Wan Sulaiman SCJ in *Holiday Inn, Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306 correctly recognises that Sections 33(1) and 56 cannot be treated as being housed in watertight compartments with no permissible overlap under any circumstances. The power of the court to interpret an award or a collective agreement which has been taken cognizance of cannot, to borrow the more descriptive language of Macbeth, be 'cabind, cribb'd and confined.
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> Accordingly, in my judgment, the question whether the court, when entertaining a complaint under section 56(1) of the Act has indeed acted in excess of its jurisdiction by exercising its powers under section 33(1) is one that depends upon the peculiar circumstances of a particular case.
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> There may be circumstances, such as those as existed in *Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 which may warrant a superior court forming the view that an error of law has been occasioned by the court's unwarranted transgression of the power of interpretation when exercising its power of enforcement. On the other end of the scale, there may be cases in which an interpretation of an award or collective agreement is a *sine qua non* to ascertain whether there has indeed been non-compliance of the same. To say in such circumstance the complaint is to be summarily driven away from the judgment seat because a question of interpretation has arisen, is to nullify legislative intent, namely, the expeditious settlement of individual disputes. It follows, therefore, that the extreme properties that the court, when considering a complaint under section 56(1), may never interpret an award or collective agreement any circumstances is fallacious and not worthy of a second glance.

No doubt I am bound by the said decision, but I am also unable to ignore the two decisions of the Supreme Court in *Holiday Inn (supra)* and *Dragon Phoenix Bhd. v. Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Anor*. [1991] 1 CLJ 244; [1991] 1 CLJ (Rep) 109. In the *Holiday Inn*'s case Seah SCJ held as follows:

> Now, s. 56 is concerned with the enforcement in a summary manner of an award by the Industrial Court or of a collective agreement which has been taken cognisance of by the court under s. 17 after a complaint has been lodged as its non-compliance. The non-compliance of a term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its powers contained in sub section (2) thereof. It is, therefore, a condition precedent to the exercise of these powers and there should be in existence a break or non observant of a term of the award or collective agreement. This must be satisfactorily established by the complainant ... .

In *Dragon Phoenix Bhd*. Harun Hashim SCJ said:

> In a complaint of non-compliance with any term of a collective agreement or award under s. 56 of the Industrial Relations Act 1967, the Industrial Court ... should not embark on an expedition to examine the provision of the Employment Act 1955 or order to determine the meaning of the term complained of unless there is a specific reference to it because to do so would involve the interpretation function of the court under s. 35 of the Industrial Relations Act 1967 which is an entirely differenct exercise from that under s. 56.

From the above authorities, it is clear to me section 56 is intended to be a summary enforcement procedure for a clear cut case of non-compliance. This is not the situation in the present case. In the present case, there is a dispute whether the services of the respondents were terminated by BBMB. I am of the view, on the facts of this case, the finding of Industrial Court that the services of the respondents were terminated by BBMB is perverse and not supported by evidence. There is no evidence that BBMB had ever issued any letters of termination to any of the respondents when the merger between BBMB and BOC took place. The offer to the respondents for continued employment came from BOC. Nevertheless, a meeting was held between KEPAK and BBMB to resolve whatever ambiguities relating to the offer of continued employment of the respondents by BOC. An agreement was reached on 2 September 1999 and BOC then on the same date issued a letter to provide clarification on the original offer letter. The offers were accepted by the respondents.

It is clear to me that there is no evidence placed before the Industrial Court to support the court's conclusion that BBMB had terminated the services of the respondents. To me, the action of the respondents claiming three months salary in *lieu* of notice was done not in good faith. This is because they had accepted the offers of continued employment, after negotiating a settlement with BBMB and BOC and became the employees of BOC on exactly the same terms and conditions of employment enjoyed by them with BBMB. To complain now, that is some nineteen months after accepting the offers of continued employment by BOC, that the applicant did not give them the required three months' notice and thus seeking compensation in lieu thereof, is clearly an act in bad faith on the part of the respondents. Thus, I am not persuaded to find in favour of the respondents.

In conclusion, I am of the view that the finding of the Industrial Court that BBMB had terminated the services of the respondents is perverse and represent an error of law. Accordingly, the applicants' application is allowed with costs.